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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 625

P. F. COLLIER & SON CORPORATION, P. F. COLLIER, INC., CROWELL COLLIER and MacMILLAN, INC., *Petitioners,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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September, 1970

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INDEX

	Page
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED FOR REVIEW	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
1. The Decision Below Raises Significant and Recurring Questions Not Previously Considered by This Court Concerning the Proper Interpretation of the "Reasonable Time" Requirement of 5 U.S.C. 555(b)	6
2. The Decision Below Raises Significant and Recurring Questions Concerning Discriminatory Enforcement by Federal Administrative Agencies	11
CONCLUSION	15
APPENDIX	1A

CITATIONS

Cases:

American Committee for Protection of Foreign Born v. S.A.C.B.	8
American Marketing Associates, Inc., Dkt. 8727, CCH Trade Reg. Rep., Par. 18, 544 (Nov. 14, 1968)	13
Americana Corporation, 46 FTC 253 (1949)	13
Atlantic Ref. Co. v. Public Service Commission, 360 U.S. 378, 389 (1959)	7
Basic Books, Inc., 56 FTC 69 (1959)	13
Deering Milliken, Inc. v. Johnston, 295 F.2d 856 (C.A. 4, 1961)	9
Educational Service Company, Dkt. 8781, Consent Order (1970)	13
Encyclopedia Britannica, Inc., 48 FTC 1416 (1952)	13
F.P.C. v. Hunt, 376 U.S. 515, 527 (1964)	7

Page

F.T.C. v. J. Weingarten, Inc., 336 F.2d 687 (C.A. 5, 1964) 8

F.T.C. v. Universal-Rundle Corporation, 387 U.S. 244, 251 (1967) 12

Jacob Siegel Co. v. F.T.C., 327 U.S. 608, 611 (1946) 12

Joseph J. Bidnick, an individual trading and doing business as Standard Education Library, CCH Trade Reg. Rep., Par. 17,679 (1965-67 Transfer Binder) 13

Mapp v. Ohio, 367 U.S. 643 (1961) 10

Metro Distributors, File No. 702 3004, Proposed Consent Order (1970) 13

Moog Industries, Inc. v. F.T.C., 355 U.S. 411, 414 (1958) 12

National Surveys, etc., 47 FTC 888 (1949) 13

N.L.R.B. v. Electric Vacuum Cleaner Co., 315 U.S. 685, 698, (1942) 7

N.L.R.B. v. Mastro Plastics Corp., 354 F.2d 170 (C.A. 2, 1965), cert. denied, 384 U.S. 972 (1966) 10

Standard Educators, Inc., Dkt. 8807, Proposed Order (1969) 13

Texaco, Inc. v. F.T.C., 1962 CCH Trade Cases, ¶ 70, 382 (D.D.C. 1962) 9

The Child's World, Inc., CCH Trade Reg. Rep., Par. 18, 544 (Nov. 14, 1968) 13

Miscellaneous:

1 Davis, Administrative Law § 8.08 (1958) 7

Judicial Acceleration of the Administrative Process: The Right to Relief from Unduly Protracted Proceedings, 72 Yale L. J. 574 (1963) 9

Oulahan, Refining the Administrative Process: A Challenge for the American Bar, 151 Brief 101, 120 (1956) 8

Report of the President's Conference on Administrative Procedure, at 13 (1955) 7

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

P. F. Collier & Son Corporation, P. F. Collier, Inc., and Crowell Collier and MacMillan, Inc., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on May 27, 1970.

OPINION BELOW

The opinion of the court of appeals, not yet reported, appears in the appendix hereto.

JURISDICTION

The judgment of the court of appeals was entered on May 27, 1970. A timely petition for rehearing was denied on July 14, 1970, and this petition was filed within 90 days of that date. On August 3, 1970, the court of appeals stayed the issuance of its mandate for a period of 30 days. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Federal Trade Commission, in remanding this relatively simple case to its hearing examiner for further hearings more than six years following issuance of the complaint, and following some five years of hearings, because complaint counsel had failed to meet his burden of proof on issues of which he was fully aware during the initial hearings, violated the requirement of 5 U.S.C. § 555 that administrative proceedings be concluded within a reasonable time.

2. Whether a provision in a cease and desist order issued by the Federal Trade Commission requiring salesmen of Collier Encyclopedias to make affirmative disclosures not required of the salesmen of competing encyclopedia companies found to have been engaged in the same unlawful practices and placed under otherwise similar cease and desist orders is arbitrary and discriminatory.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 5:

§ 555. Ancillary matters

* * *

(b) . . . With due regard for the convenience and necessity of the parties or their representatives and

within a reasonable time, each agency shall proceed to conclude a matter presented to it. . . .

* * *

§ 706. Scope of review

. . . The reviewing court shall . . . hold unlawful and set aside agency action, findings and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . [or] without observance of procedure required by law . . . .

STATEMENT OF THE CASE

This case was in litigation before the Federal Trade Commission for over nine years before a cease and desist order issued prohibiting certain practices by the salesmen of Collier Encyclopedias which the Commission concluded violated Section 5 of the Federal Trade Commission Act. The evidence upon which the findings of substantive violations are based relates entirely to the period 1955 - 1960 (R. 42-43), between ten and fifteen years ago.[1] The events contributing to this delay are set out below.

On January 18, 1960, the Federal Trade Commission issued its complaint against Crowell-Collier Publishing Company and its subsidiary, P. F. Collier & Son Corporation, charging that the subsidiary had employed misrepresentations in connection with the door-to-door sale of Collier Encyclopedias in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45). Crowell-Collier Publishing Company was charged with violating Section 5 of the Act through domination of the acts and policies of its subsidiary. R. 4-10.

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[1] Certain evidence received in the remand proceeding relating to sales practices during a later period was viewed by the Commission as admissible for the limited purpose of showing corporate successorship. R. 225.

On December 30, 1960, P. F. Collier & Son Corporation was merged into Crowell-Collier Publishing Company. R. 105-06. A new subsidiary company, P. F. Collier, Inc., was formed on December 22, 1960 and began the business of selling encyclopedias. R. 104-07. The complaint was never amended to include the new company, although early in the hearing the hearing examiner clearly indicated to the Commission's complaint counsel the necessity of such an amendment. R. 33-34. Hearings began in August, 1960, and continued intermittently for about five years, until June 15, 1965, when the record was finally closed. R. 21. The delays in concluding these initial hearings were occasioned by a variety of factors, some of which were recited by the hearing examiner in his initial decision. R. 18. Substantial delays were caused by the failure or refusal of complaint counsel to reveal the names of witnesses prior to hearings, resulting in deferred cross-examination of such witnesses. R. 21. Complaint counsel called over 60 witnesses, including consumer witnesses and officers and employees of the two companies named in the complaint. He also offered over 170 exhibits. R. 21-22.

On September 3, 1965, the hearing examiner issued his initial decision. He held that complaint counsel had failed to meet his burden of proof on the question of domination of the subsidiary by the parent company. R. 27-32. He also held that P. F. Collier & Son Corporation, being no longer in existence, was not subject to a Commission order, since those orders can operate prospectively only and there was no competent evidence that the new company (P. F. Collier, Inc.) was a successor to the dissolved company. R. 32-40. He also noted that most of the evidence of substantive violations was between five and ten years old and related exclusively to a corporation that had been dissolved for nearly five years. The reasonable time requirement of the Administrative Procedure Act and the staleness of the record led him to conclude that further maintenance of the proceeding would not be in the public interest. R. 40-44.

On September 30, 1966, the Commission, two Commissioners dissenting, vacated the initial decision and remanded the case to a new examiner, the original examiner having died in the interim. The Commission agreed with the deceased examiner's conclusion that the evidence of record failed to establish either liability of Crowell Collier and MacMillan, Inc.,[2] through domination of its subsidiaries or the liability of P. F. Collier, Inc., through successorship to P. F. Collier & Son Corporation. It observed, however, that complaint counsel on appeal had alluded to matters which would be relevant to these issues if properly before it. Rejecting petitioners' argument that the complaint should be dismissed, the Commission remanded the case for the purposes of (1) ascertaining the truth of this information and obtaining it in probative form; (2) allowing complaint counsel to support the claim of successorship; and (3) allowing rebuttal. R. 72-73. The Commission also made findings of substantive violations of the Act by P. F. Collier & Son Corporation with respect to practices occurring during 1955-1960, and a cease and desist order was issued against that company, with the effective date suspended until further notice. R. 74-84.

Further hearings were held in the fall of 1967, and the record closed on October 16, 1967.[3] The initial decision of the second hearing examiner was released on January 4, 1968, almost eight years after issuance of the complaint. Based on the new evidence, the examiner concluded that Crowell Collier and MacMillan, Inc. dominated and con-

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[2]On May 6, 1965, Crowell-Collier Publishing Company changed its name to Crowell Collier and MacMillan, Inc. R. 103.

[3]In December 1966 Crowell Collier and MacMillan, Inc. and P. F. Collier, Inc. sought to have the remanded proceedings enjoined in the United States District Court for the District of Columbia (Civil Action No. 3251-66). The complaint was dismissed on May 26, 1967, and a subsequent appeal to the court of appeals was thereafter voluntarily dismissed because remand hearing dates had been set by the second hearing examiner. R. 101.

trolled the acts of its subsidiary, and that P. F. Collier, Inc. was a successor to P. F. Collier & Son Corporation. R. 148.

The final order of the Commission was issued on February 4, 1969, more than nine years following issuance of the complaint. The 1966 cease and desist order was made effective against all the petitioners herein.

Paragraph 3 of this order requires the salesmen

> . . . to disclose at the time admission is sought into the home, office or other establishment of the prospective purchaser or purchasers that the person making the call is respondent's salesman and is soliciting the sale of respondent's merchandise. R. 66.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Raises Significant and Recurring Questions Not Previously Considered by This Court Concerning the Proper Interpretation of the "Reasonable Time" Requirement of 5 U.S.C. 555(b).

Section 6(b) of the Administrative Procedure Act, as amended (5 U.S.C. 555(b)), requires the Federal Trade Commission to "proceed to conclude a matter presented to it . . . within a reasonable time." Section 10(e) of the Act, as amended[4] (5 U.S.C. 706), directs reviewing courts to "hold unlawful and set aside agency action . . . found to be . . . without observance of procedure required by law." Notwithstanding these statutory directives, the court below has affirmed an order of the Federal Trade Com-

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[4]The wording of these provisions was slightly revised when the Act was codified into positive law in 1966. However, the substance of these provisions contained in former 5 U.S.C. 1005 and 1009 was in effect throughout the proceedings involved here. See Reviser's Notes following 5 U.S.C.A. 555, 706.

mission in this relatively simple case which was entered some nine years following issuance of its complaint, and which rests upon evidence of substantive violations that is now ten to fifteen years old. The court below rejected petitioners' argument based on the Commission's delay, concluding that judicial relief on that ground would not "spur the Commission into more expeditious action in all subsequent cases."

This Court has repeatedly expressed concern about "nigh interminable" delays in the administrative process. See *F.P.C. v. Hunt*, 376 U.S. 515, 527 (1964); *Atlantic Ref. Co. v. Public Service Commission*, 360 U.S. 378, 389 (1959); *N.L.R.B. v. Electric Vacuum Cleaner Co.*, 315 U.S. 685, 698 (1942). Bearing out this concern, the leading commentator in the field has said: "One of the supposed advantages of the administrative process is speedy disposition of controversies. But the unfortunate fact is that many administrative proceedings are slower than comparable judicial proceeding." 1 Davis, *Administrative Law* § 8.08 (1958). Exhortations to the agencies for greater efficiency have proven largely futile.[5]

Some agencies have reneged on promises to expedite their proceedings. For example, in 1961, about a year after the complaint was issued in this case, the Federal Trade Commission announced "extensive and far-reaching changes in its rules governining the trial and disposition of complaints against deception . . . in the marketplace." The Commission announced as a "principal purpose of the revisions" the prohibition of "overly deliberate prosecution and hearing of cases by the FTC's own staff." F.T.C. Press Release, July 6, 1961. Eight years later, this relatively simple case was finally decided by the Commission.

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[5] For example, a Presidential Commission recommended fifteen years ago "that every agency consider unnecessary delay, expense, and volume of records in adjudicatory and rulemaking proceedings to be detrimental to the public interest." *Report of the President's Conference on Administrative Procedure*, at 13 (1955).

The evils associated with inordinate agency delay are as serious as they are apparent. The public interest suffers because the statutes the agencies are mandated to enforce go unenforced. Unreasonably protracted proceedings are unfair to respondents for several reasons. When orders are finally issued, they rest, as here, upon stale evidence that may have little relationship to respondents' present activites. See *American Committee for Protection of Foreign Born v. S.A.C.B.*, 380 U.S. 513 (1965). The stigma of alleged but unproved violations of law may result in grave economic injury. Defending against such allegations in seemingly interminable hearings, often convened and reconvened in various parts of the country, inevitably involves very substantial time and expense.

We submit that the court below should have set aside the Commission's order and remanded with instructions to dismiss the complaint because the Commission violated the "reasonable time" requirement of Section 6(b) of the Administrative Procedure Act. This court has not previously considered the meaning of the reasonable time requirement, or the consequences of its violation. Decisions in the lower federal courts afford little guidance with respect to these questions. Perhaps largely as a result of this uncertainty, "few provisions of [the Administrative Procedure Act] have proven more useless in securing speedy and fair administrative justice." Oulahan, *Refining the Administrative Process: A Challenge for the American Bar*, 151 Brief 101, 120 (1956).

The two leading cases in the courts of appeals concerning the reasonable time requirement are factually distinguishable from one another and the present case, but reflect differing approaches to the general problem of delay. In *F.T.C. v. J. Weingarten, Inc.*, 336 F.2d 687 (C.A. 5, 1964), *cert. denied*, 379 U.S. 908 (1965), the Fifth Circuit held that the reasonable time requirement had not been violated where the complaint had pended for some two and one-half years before a hearing examiner for eleven months

thereafter before the Commission, the Commission had thereafter remanded for further hearings, and the respondents had not previously complained about the pace of the proceedings. These facts, said the Fifth Circuit, did not present "an occasion for the preemptory intervention of an outside Court in the conduct of an agency's adjudicative proceedings." *Id.* at 692.

In *Deering Milliken, Inc. v. Johnston*, 295 F.2d 856 (C.A. 4, 1961), the Fourth Circuit sustained a district court injunction limiting the scope of a second agency remand hearing holding that the reasonable time requirement was enforceable under Section 10(e) of the Administrative Procedure Act. There, the administrative proceedings were about five years old, and that part of the agency's remand order which the court held illegal would have re-opened the proceedings for the exploration of issues previously tried at substantial expense to the respondent. The net effect of the differing results and judicial approaches in *Weingarten* and *Deering Milliken* leave the meaning of the reasonable time requirement uncertain.[6]

As the Fourth Circuit said in *Deering Milliken, supra* at 867–

> There are no absolute standards by which it may be determined whether a proceeding is being advanced with reasonable dispatch. What is reasonable can be decided only in the light of the nature of the proceedings and the general and specific problems of the agency in discharging its functions and duties.

Nevertheless, the decision below in this case demonstrates the need for guidance from this Court as to meaning of the reasonable time requirement and the consequences of its

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[6]Other cases involving this requirement do little to elucidate its meaning. See, *e.g., Texaco, Inc. v. F.T.C.*, 1962 CCH Trade Cases, ¶ 70, 382 (D.D.C. 1962). See generally, *Judicial Acceleration of the Administrative Process: The Right to Relief from Unduly Protracted Proceedings*, 72 Yale L. J. 574 (1963).

violation. Specifically, this Court should make it clear that final agency orders resting on stale records may be set aside where the case was not processed with reasonable dispatch. Experience has amply demonstrated that the possibility of such judicial relief is the only way to ensure compliance with the Administrative Procedure Act.[7]

This case is an appropriate vehicle for consideration of the reasonable time requirement.[8] It is a relatively simple case, involving alleged misrepresentations in the sale of encyclopedias, and control questions among corporate respondents. *Compare N.L.R.B. v. Astro Plastics Corp.*, 354 F.2d 170 (C.A. 2, 1965), *cert. denied*, 384 U.S. 972 (1966), involving necessarily time-consuming hearings concerning back-pay awards of numerous employees. Unlike the situations presented in the *Weingarten* and *Deering Milliken* cases (discussed above) where respondents sought to enjoin further agency hearings and the courts were understandably concerned about premature interference in agency proceedings, the agency proceedings here have finally been concluded. Thus, this Court is in a position to judge the reasonableness of the agency's delay based on the entire record.

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[7] The court below declined to grant this relief for the expressed reason that "In so doing . . . we would release two wrongdoers, and the public, not the Commission, would be the loser." In our view, this reasoning is short-sighted and fallacious. The overall effect of such relief in isolated cases of egregious delay would be to speed agency processes generally, to the benefit of the public, the Commission, and respondents. A similar premise underlies this Court's decision in *Mapp v. Ohio*, 367 U.S. 643 (1961), and related cases.

[8] As Commissioner McIntyre observed in dissenting from the order remanding this case to the hearing examiner in 1966—

> "Too often one of the members of the Commission and others have complainted that the Federal Trade Commission is a fit article for a museum. Some of this criticism is directed against prolonged proceedings and ineffectiveness. To take part in this action of the majority is to help this criticism. I will not be so obliging. I dissent." R. 86.

The delay was substantially attributable to the failure of complaint counsel to allow clearly proper discovery and to amend the complaint to include one of the subsidiary corporations.[9] And although some of the delays were justified, the hearing examiner could have conducted the initial (five year) hearings with greater dispatch. To be sure, petitioners delayed the proceeding for about one year in their unsuccessful effort to enjoin the remand proceeding; but that effort was based on our contention—to which we adhere—that the complaint should have been dismissed in 1966, after the complaint counsel had had more than a reasonable opportunity in the initial hearings to prove his case, and had failed to do so. In any event, as the court below noted, "by tolerating such delays, the Federal Trade Commission, which was created to expedite the prosecutions of those employing deceptive acts or practices in commerce, becomes their accomplice."

2. The Decision Below Raises Significant and Recurring Questions Concerning Discriminatory Enforcement by Federal Administrative Agencies

The court below affirmed the Commission's order in its entirety, including that portion of the order requiring petitioners' salesmen to make affirmative disclosures at the time admission is sought to the home of a prospective customer that they are selling petitioners' merchandise.[10] That

[9] See p. 4, *supra*.

[10] The court's opinion (pp. 22-24) makes it quite clear that it took an overly broad view of petitioners' argument on this narrow but crucial objection to the Commission's order. It there stated that our objection was to both Paragraphs 3 and 4 of the order. This is not the case.

Petitioners did not object to Paragraph 4, which requires them to cease and desist from

> using any plan, scheme or ruse as a door-opener to gain admission into a prospect's home, office or other establishment which misrepresents the true status and mission of the person making the call.

such an immediate affirmative statement would diminish the possibility of a sale is self-demonstrating. The other parts of the Commission's order effectively prohibit all of the practices which it considered misleading, practices which the cases cited in the court's opinion below demonstrate are commonplace in the industry. Petitioners have not and do not object to any of these parts of the order. The Commission has found the practices they prohibit unlawful and has entered similar orders against petitioners' competitors in other cases. Petitioners do not ask permission to misrepresent or to mislead. They only ask to be allowed to do what their competitors may do: to utilize proper "door-openers". They object to being singled out as the only company in this business required by order to use a "door-closer."

To be sure, as a general proposition, "the Commission has wide discretion in its choice of a remedy deemed adequate to cope with unlawful practices." *Jacob Siegel Co. v. F.T.C.*, 327 U.S. 608, 611 (1946). Where, however, a particular practice is widespread in an industry, it is unfair to single out one respondent for special restriction, leaving his competitors free to engage in the practice. In recognition of the need to limit agency latitude for such discriminatory enforcement and consequent competitive injury this Court has said that "the Federal Trade Commission does not have unbridled power to institute proceedings which will arbitrarily destroy one of many law violators in an industry." *F.T.C. v. Universal-Rundle Corporation*, 387 U.S. 244, 251 (1967). A Commission remedy embodying such an unfair competitive disadvantage should be set aside if the record reflects a "patent abuse of discretion." *Moog Industries, Inc. v. F.T.C.*, 355 U.S. 411, 414 (1958).

This paragraph deals with misrepresentations of fact as a door-opener, and petitioners did not (and do not) urge that its salesmen be allowed to misrepresent facts. This apparent misconstruction of petitioners' position was pointed out in our petition for rehearing below, which was denied without opinion.

In the *Moog* and *Universal-Rundle* cases, the courts of appeals had granted relief from allegedly discriminatory Commission orders, and this court reversed. We submit that the general principles stated in those cases are correct, that those cases are factually distinguishable from the present case, and that the affirmative disclosure remedy involved in the present case, in light of prevailing practices in the industry, constitutes a patent abuse of discretion. In *Moog*, it was apparently unclear "whether and to what extent there is a relevant 'industry' within which the particular respondent competes" and whether the particular practice was "operative throughout an industry." *Supra* at 413. Similarly, in *Universal-Rundle*, this Court found no basis for the lower court's determination that the practice in question was prevalent throughout the industry. There can be no doubt on those scores here. The Commission's orders and opinions demonstrate beyond question that door-to-selling of encyclopedias is a separate industry, and that the practice of using "door-openers", deceptive or innocuous, is well-nigh universal. See *Educational Service* Company, Dkt. 8781, Consent Order (1970); *Metro Distributors*, File No. 702 3004, Proposed Consent Order (1970); *Standard Educators, Inc.*, Dkt. 8807, Proposed Order (1969); *American Marketing Associates, Inc.*, Dkt. 8727, CCH Trade Reg. Rep., Par. 18,554 (Feb 5, 1968); *The Child's World, Inc.*, CCH Trade Reg. Rep., Par 20892 (Nov 14, 1968); *Joseph j. Bidnick, an individual trading and doing business as Standard Education Library*, CCH Trade Reg. Rep., Par. 17,679 (1965-67 Transfer Binder); *Basic Books, Inc.*, 56 FTC 69 (1959); *Encyclopedia Britannica, Inc.*, 48 FTC 1416 (1952); *Americana Corporation*, 46 FTC 253 (1949); *National Surveys, etc.*, 47 FTC 888 (1949).

We do not contend, as the court below seemed to suggest, that the Commission may not begin to enter stronger remedial orders in similar cases if experience shows such relief to be necessary. The Commission is, of course, not bound to adhere to a demonstrably inadequate remedy.

We do contend, however, that the Commission's accumulated expertise in fashioning remedies must be applied even-handedly to respondents engaged in essentially similar practices. The Commission's affirmative disclosure order entered against petitioners in 1966 was apparently the first such order in a case of this kind. Since that time, the Commission has entered at least five orders against respondents engaged in the door-to-door sale of encyclopedias by the same methods petitioners have used. See cases cited *supra*. These cases are essentially indistinguishable, except for the Draconian remedy entered against petitioners.

This Court has considered the problem of the anti-competitive effect of remedial orders in only two previous cases, discussed above, and relief has been denied in both. While the scope of judicial review in this area is narrow, the Court should take an appropriate occasion to demonstrate that some meaningful limits to agency discretion exist. This case affords an opportunity to define those limits.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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APPENDIX

No. 19549

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

P.F. COLLIER & SON CORPORATION, P.F. COLLIER, INC., and CROWELL COLLIER & MACMILLAN, INC., *Petitioners,* v. FEDERAL TRADE COMMISSION, *Respondent.*	PETITION to Review an Order of the Federal Trade Commission.

Decided and Filed May 27, 1970.

Before: WEICK, EDWARDS and CELEBREZZE, Circuit Judges.

CELEBREZZE, Circuit Judge. This cause is before the Court on the petition of Crowell Collier and MacMillan, Inc. [hereinafter "Crowell Collier"] and two of its subsidiaries, P.F. Collier and Son Corporation [alternatively referred to as "Collier & Son" and "P.F. Collier & Son Corp. [#2]"] and P.F. Collier, Inc. [hereinafter "Collier, Inc."], to review an order of the Federal Trade Commission requiring the petitioners to cease and desist from certain unfair and deceptive trade practices allegedly employed in the door-to-door sales of Collier Encyclopedias.

I.

Statement of the Facts and the Proceedings Below.

On January 18, 1960, the Commission issued an administrative complaint against Crowell Collier, a holding company, and

its wholly-owned subsidiary, Collier & Son, charging that the latter had used unfair and deceptive methods in the door-to-door sales of encyclopedias in violation of Section 5 of the Federal Trade Commission Act.[1] Beginning in August, 1960, hearings were held before a trial examiner. On December 30, 1960, Collier & Son was merged into Crowell Collier; on December 22, 1960, Collier, Inc. was formed to take over the business of selling encyclopedias from Collier & Son.[2] Nearly five years later, on September 3, 1965, the trial examiner rendered an initial decision in which he found that: Crowell Collier was not subject to an order because it was not engaged in interstate commerce; Crowell Collier had not so dominated and controlled the management of Collier & Son that the corporate identity of the latter could be ignored, that is, the parent could not be held derivatively responsible for the acts of its subsidiary; Collier & Son was not subject to an order because Federal Trade Commission orders operate prospectively, and to subject a dissolved corporation to such an order would be a "useless act"; insofar as most of the evidence adduced at the hearings involved illegal practices occuring between 1955 and 1960, the staleness of the evidence warranted a determination that it was "not in the interest of the public" to give further life to the proceeding. In view of these findings, the examiner made no findings with regard to the substantive violations of the Act alleged in the complaint, which he dismissed.

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[1] The pertinent provisions of the statute are:

Sec. 5(a)(1). "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful." 15 U.S.C. § 45 (a)(1) (1964).

Sec. 5(a)(6). "The Commission is empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." 15 U.S.C. § 45 (a)(6) (1964).

[2] For reasons which remain obscure, the Commission never amended its complaint to include Collier, Inc.

On appeal, with two commissioners dissenting,[3] the Commission vacated the initial order of the trial examiner. It made extensive findings of substantive violations of the Act by Collier & Son and, on September 30, 1966, it issued a cease and desist order enjoining "P.F. Collier & Son Corporation under this or any other name, its successor or assign . . ." from committing further violations. The Commission then abated this order pending a "limited" remand to a trial examiner for further findings on the following issues *"inter alia"*: Whether a "successor" of Collier & Son existed against which the cease and desist order could be enforced; whether the parent (Crowell Collier) in fact so dominated and controlled the management of its subsidiaries (Collier & Son and Collier, Inc.) that it should also be subjected to the order.

Notwithstanding the petitioners' vigorous protestations that the remand proceedings were illegal, hearings were held before a second trial examiner, the first examiner having passed away prior to the Commission's order.[4] In addition to accepting fresh evidence of "successorship" and "domination," the new examiner also accepted extensive testimony and exhibits tending to show that Collier, Inc. had perpetuated the deceptive sales practices of Coller & Son. On January 4, 1968, the hearing examiner released his lengthy decision in which he concluded that Crowell Collier so dominated and controlled the acts of Collier & Son that the corporate identity of the latter was "a mere fiction"; that Collier, Inc. was indeed a successor to Collier & Son; that Collier, Inc. had

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[3] Commissioner MacIntyre dissented on the grounds that the proceedings had been so unduly protracted as to deny the petitioners due process of law, and that the Commission had sufficient evidence before it to dispose of the issues for which it remanded the case for a second hearing. Commissioner Elman dissented without opinion. The opinions of the Commission and of Commissioner MacIntyre are reproduced at Par. 17,748 CCH Trade Reg. Rep. (Transfer Binder 1967).

[4] The petitioner's allegations of error regarding the legality of the remand proceedings were saved for this appeal, and shall be considered below.

employed the same unfair and deceptive sales methods as had Collier & Son before it.[5]

On February 4, 1969, the Commission adopted the findings and conclusions of the second examiner, and reinstated the order it originally issued on September 30, 1966.[6] It is that

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[5] The second hearing examiner's January 4, 1968 order is noted in CCH Trade Reg. Rep., Par. 18,153 (1968).

[6] Commissioner Elman did not concur in the Commission's order. The order and opinion of the Commission are reproduced in CCH Trade Reg. Rep., Par. 18,684 (1969).

The September 30, 1966 order, which was reinstated on February 4, 1969, provided:

"IT IS ORDERED that respondent P. F. Collier & Son Corporation under this or any other name, its successor or assign and officers, agents, representatives, salesmen, and employees, directly or indirectly, through any corporate or other device, in connection with the publication and direct or door-to-door sale and distribution of encyclopedias, books, publications or other merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

"1. Representing, directly or indirectly, that:

a. Respondent's representative making the call is conducting a survey of any kind, is engaged in a brand identification program, is connected with respondent's advertising, promotion, publicity, education or any department other than sales, is calling on a special list of people or is not selling anything;

b. Respondent is offering encyclopedias or other books or articles, alone or in combination, free of any cost or charge or at a reduced price (1) in return for a letter from the purchaser with his or her opinion about the encyclopedia and permission to use the purchaser's name or (2) on the condition of the purchase of the yearly supplement or any other book or article;

c. Respondent, under any circumstances, is offering encyclopedias, alone or in combination, free of any cost or without charge or obligation;

d. The offer of respondent's encyclopedia is a "special introductory offer" or that any offer is limited in point of time or in any manner;

e. The offer of the encyclopedia or any other book or article (1) is being made to a specially selected group of people or (2) is not being offered to the public generally at the time of the call of the representative or (3) is made in advance of the general sales promotion of the item which will be conducted at a later date;

f. Respondent's annual supplement or year book usually and regularly sells for $10.00 or any amount in excess of the price usually and regularly charged for the book;

g. The encyclopedia offered to the prospective customer is nationally advertised for $389 or any sum of money which is in excess of the price at which respondent's

order and the proceedings giving rise to it that are now under review.

There are essentially three sets of issues on this appeal: First, issues involving the lawfulness and sufficiency of the Commission's substantive findings; second, issues involving the nature of the proceedings below and the interest of the public; third, the issue of the lawfulness and propriety of the Commission's order. We shall present and discuss the issues in that sequence.

II.

A. Whether the Commission's finding that Crowell Collier dominated and controlled the operation of Collier & Son, and should thereby be subject to the order to cease and desist, is supported by substantial evidence and in accordance with law.

The general rule is that, absent highly unusual circumstances, the corporate entity will not be disregarded. *See*

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encyclopedia of the same grade and quality as that shown to the prospect is regularly sold to the purchasing public at such time;

h. The cost of respondent's encyclopedia, book, publication or other article of merchandise may be paid for over a 10-year period or other specified period of time when such time is in excess of the period of time in which respondent will accept deferred payments.

"2. Misrepresenting:

a. The prices of or the savings available to members of the public or to purchasers of respondent's merchandise by means of comparative prices or in any other manner;

b. The employment status of respondent's salesmen or representatives; or

c. The nature of, or the conditions connected with, the offer of merchandise made to members of the public or to purchasers.

"3. Failing to disclose at the time admission is sought into the home, office or other establishment of the prospective purchaser or purchasers that the person making the call is respondent's salesman and is soliciting the sale of respondent's merchandise.

"4. Using any plan, scheme or ruse as a door-opener to gain admission into a prospect's home, office or other establishment, which misrepresents the true status and mission of the person making the call.

• • • •"

H. G. Henn, *Corporations* 204-205 (1961); W. M. Fletcher, *Cyclopedia of the Law of Corporations* §§ 41-46 (rev. ed. 1963). However, it is well established that where stock ownership is resorted to for the purpose of controlling a subsidiary so that it may be used as "a mere agency or instrumentality" of the parent

> "the courts will not permit themselves to be blinded or deceived by mere forms or [*sic*] law but, regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require." *Chicago, Milwaukee & St. Paul Railway Company* v. *Minneapolis Civic and Commerce Association*, 247 U.S. 490, 501 (1918).

North American Company v. *Securities Exchange Commission*, 327 U.S. 686 (1946); *National Labor Relations Board* v. *Deena Artware, Inc.*, 361 U.S. 398, 403 (1960), citing opinion of Cardozo, J. in *Berkey* v. *Third Avenue Railway Company*, 244 N.Y. 84, 94-95, 155 N.E. 58, 61, 50 A.L.R. 599, 604-605 (1926). *See Stevens on Corporations* §§ 17, 18 (2d ed. 1949). Manifestly, where the public interest is involved, as it is in the enforcement of Section 5 of the Federal Trade Commission Act, a strict adherence to common law principles is not required in the determination of whether a parent should be held for the acts of its subsidiary, where strict adherence would enable the corporate device to be used to circumvent the policy of the statute. *See Joseph A. Kaplan & Sons, Inc.* v. *Federal Trade Commission*, 347 F.2d 785, 787 n. 4 (D.C. Cir. 1965). *Cf. Bowater S.S. Co.* v. *Patterson*, 303 F.2d 369 (2d Cir. 1962), *cert. denied*, 371 U.S. 860 (Norris-LaGuardia Act); *Higgins* v. *Smith*, 308 U.S. 473 (1940) (Revenue Act of 1932).

The Commission's conclusion that Crowell Collier dominated and controlled Collier & Son, and that they formed a single enterprise for the purposes of section 5, is supported by sub-

stantial evidence on the record as a whole, Section 5(c), Federal Trade Commission Act, 15 U.S.C. § 45(c) (1964); *Universal Camera Corporation* v. *National Labor Relations Board*, 340 U.S. 474, 487-88 (1951), and is otherwise in accordance with the foregoing legal principles. The factual findings buttressing this conclusion, which shall be summarized below, were that the parent not only wholly-owned its Collier subsidiaries, but also that its interchanged personnel with its subsidiaries and maintained common or overlapping officers and directors; operated through its subsidiaries, which were often created and dissolved for purposes unrelated to the business carried on by the corporate complex; approved the use by its subsidiaries of the parent's name and goodwill in order to develop favorable public associations between the parent and its subsidiaries; and possessed and exercised ultimate control over Collier & Son.

Overlapping of officers and directors among the parent and its subsidiaries. Between 1950 and the present date, the following corporations have sold Collier Encyclopedias:

Sales Corporation	Operative Time Period
P.F. Collier & Son Corp. [#1]	1950–Jan. 2, 1952
Crowell Collier [Through a Division]	Jan. 2, 1952–July 16, 1954
P.F. Collier & Son Corp [#2]	July 16, 1954–Dec. 30, 1960
P.F. Collier, Inc.	Dec. 30, 1960–Present

When P.F. Collier & Son Corp. [#1] was dissolved at the beginning of 1952, its sales managers went to work for Crowell Collier, and its three directors were also vice president, president, and chairman of the board of the parent company, as well as directors of the parent. Furthermore, the subsidiary's president was a vice president of the parent, and its treasurer, assistant treasurer, and secretary held the same positions in the parent.

For the next two years, when the parent sold the encyclopedias through a division, the officers of that division were the same men who had been officers of the dissolved P.F. Collier & Son Corp. [#1].

When P.F. Collier & Son Corp. [#2] assumed the sales of encyclopedias in 1954, its four directors were also chairman of the board and treasurer of the parent, as well as two directors of the parent. Its president was a director of the parent, one of its vice presidents was treasurer of the parent, its treasurer was a director of the parent, and its secretary was also secretary of the parent.

In 1960, the year the complaint in this case was filed, the following individuals held overlapping positions in Crowell Collier and P.F. Collier & Son [#2]:

Positions Held, 1960

Official	Crowell-Collier	P. F. Collier & Son Corporation
John Boe	V.P.	Pres., Dir.
Norman Bennett	V.P.	V.P., Dir.
E. J. McCaffrey	Treas.	V.P., Dir.
J. M. MacDonald	Sec.	Sec.
Wm. J. Sief	Controller	Treas., Controller, Dir.
Raymond C. Hagel	Pres., Dir.	Ch. of Bd. of Dir.
W. D. Cole	Ch. of Bd of Dir.	Dir.
Sumner Blossom	Vice Ch. of Bd. of Dir.	Dir.

In 1961, after Collier, Inc. replaced P.F. Collier & Son Corp. [#2] as the selling entity, six of the ten officers of the subsidiary were also officers of the parent, and all seven directors of the subsidiary were officers or directors of the parent. In 1965, seven of the thirteen officers of the sub-

sidiary were officers of the parent, and all five directors of the subsidiary were officers or directors of the parent.

From these and others of the Commission's findings, it is apparent that many of the men who directed the policy and operations of Crowell Collier also directed the policy and operations of its wholly-owned subsidiaries.

Organizational manipulations. In the determination of whether Crowell Collier may be held responsible for the acts of its subsidiaries, this Court must consider the "pattern and framework of the whole enterprise." *Art National Mfrs. Dist. Co.* v. *Federal Trade Commission*, 298 F.2d 476, 477 (2d Cir. 1962); *Delaware Watch Company, Inc.* v. *Federal Trade Commission*, 332 F.2d 745 (2d Cir. 1964). In so doing, this Court cannot overlook Crowell Collier's creation, dissolution, and replacement of lookalike subsidiaries throughout its existence, often for purposes unessential and unrelated to the maintenance of corporate vitality.

On January 14, 1939, in a case which it docketed as number 3687, the Federal Trade Commission issued a complaint against P.F. Collier & Son Corp., a New Jersey corporation, and the predecessor of P.F. Collier & Son Corp. [#1], a Delaware corporation. The complaint charged unfair and deceptive practices in connection with sales of encyclopedias. On July 25, 1939, the Board of Directors of Crowell-Collier met and decided to dissolve the New Jersey corporation and re-incorporate it in Delaware, in order to avoid certain taxes that were levied that year against all New Jersey corporations. On July 29, 1939, P.F. Collier & Son Corp. [#1] was incorporated in Delaware. On September 28, 1939, P.F. Collier & Son, the New Jersey corporation, was merged into its parent, Crowell Collier, and subsequently the Commission ordered the case against it closed, for that reason.

On January 2, 1952, P.F. Collier & Son Corp [#1] was dissolved and merged into Crowell Collier. Mr. Eugene J. McCaffrey, an officer of the parent from 1951 to 1962, testified that the sole reason for dissolving P.F. Collier & Son Corp.

[#1] was to separate the selling of magazines, the selling of books, and the collection of accounts to three of the parent's managers. He stated that the dissolution had nothing to do with pending legal proceedings, which he claimed to know nothing about. On cross examination, it was brought out that in 1952 the United States brought a criminal action against P.F. Collier & Son Corp. [#1] for violation of the Fair Labor Standards Act of 1938. A motion to quash service of process on the ground that P.F. Collier & Son Corp [#1] was no longer in existence was sustained by the United States District Court for the Southern District of Indiana. However on appeal, in *United States* v. *P.F. Collier & Son Corp.*, 208 F.2d 936 (7th Cir. 1953), the United States Court of Appeals reversed, holding that the dissolved corporation could be proceeded against either civilly or criminally as authorized by the laws of the State of Delaware.

On December 30, 1960, P.F. Collier & Son Corp. [#2], having been incorporated just six years earlier, was dissolved and merged into Crowell Collier, and on that same date Collier, Inc. was created. The sections in the articles of incorporation of P.F. Collier & Son [#2] and Collier, Inc. dealing with corporate purposes and the nature of business to be transacted are identical word for word. Under the merger agreement and resolution for the creation of Collier, Inc., substantially all of Collier & Son's assets were to be transferred to Crowell Collier, and then to be transferred from Crowell Collier to Collier, Inc. It is of no minor importance to note that Collier & Son was dissolved just eleven months after the filing of the complaint in this case, and that one of its defenses to this action is the Commission's alleged inability to proceed against a dissolved corporation.

Importantly, whenever Crowell Collier substituted a new subsidiary for a dissolved one, the corporate agents of the old and new subsidiaries were practically all the same people, albeit, perhaps, with different titles and occupying different positions. And in all instances, the disappearance and re-

emergence of the corporate subsidiaries was dictated by parental decision.

Subsidiaries' use of the parent's name and reputation. There is extensive evidence of the use by the Crowell Collier subsidiaries of the name, reputation, and goodwill of the parent. Where such a course of conduct reveals a calculated ploy by a subsidiary, with the knowledge and approval, however tacit, of the parent, to deceive the public into believing that it is dealing with the parent, when, in fact, it is dealing with a subsidiary, it is relevant to the issue of parental domination. And where, as in this case, there has been substantial overlap between the officers and directors of the parent and its subsidiaries, the requisite knowledge and approval may be inferred.

Between 1949 and 1962, Crowell Collier or its currently operative subsidiary, used order blank forms in the sales of Collier Encyclopedias, in which the parent was held out as the publisher of the encyclopedias. A form used in 1949 by P.F. Collier & Son Corp. [#1], for example, provides:

> "The story of Collier's Encyclopedia. Its sponsors, with 75 years of experience in publishing educational books, part of a great organization responsible for the success of three of America's outstanding publications — Collier's, The American, and Woman's Home Companion magazines, expended more than a year in an exhaustive program of preliminary planning and organizing this tremendous editorial undertaking."

This form is, in all respects, typical of forms used by Crowell Collier, P.F. Collier & Son [#2] and Collier, Inc. in subsequent years. While they may vary slightly in form, all are substantively identical. In addition, the 1962 form, used by Collier, Inc. provided:

> "P.F. Collier, Inc.
> The Crowell Collier Publishing Company
> 640 Fifth Avenue
> New York 19, N.Y.."

In the sales presentations used by representatives of Collier & Son it was intimated that they were connected with Crowell Collier. The salesmen were instructed to introduce themselves as being from the former magazine publisher; or that they were from the Collier Company, which is the largest publisher in the world; or that, for the past 86 years, the name "Collier" has been recognized as meaning magazines. The second trial examiner found that substantially the same sales practices have been perpetuated by Collier, Inc.

Just as relevant, in this case, is the fact that the very names assigned to its subsidiaries by the parent could easily be mistaken for the name of the parent. Each subsidiary which has sold these encyclopedias has had the word "Collier" in its name. That sales agents and hiring personnel used this device to capitalize on the parent's reputation and goodwill cannot be doubted on this record. This device having been employed to deceive the public into believing that it is dealing with the parent, when in fact it is dealing with a subsidiary, it is evidence of parental domination for the purposes of the Federal Trade Commission Act, the very purpose of which is to prevent "deceptive acts or practices in commerce . . . ." 15 U.S.C. § 45 (a)(1) (1964).

Actual control by Crowell Collier over the affairs of its subsidiaries. We find substantial evidence in the record as a whole to support the Commission's findings of actual interference by Crowell Collier in the day-to-day policies and operations of Collier & Son and Collier, Inc. We also find substantial evidence to support the Commission's finding that elements within the Crowell Collier corporate complex have never dealt with each other as independent commercial entities, and that they have interchanged business functions as the circumstances warranted in a manner which was wholly inconsistent with any purported corporate separation between the parent and the subsidiary.

In the alternative, however, the law is clear that where

a parent possesses latent power, through interlocking directorates, for example, to direct the policy of its subsidiary, where it knows of and tacitly approves the use by its subsidiary of deceptive practices in commerce, and where it fails to exercise its influence to curb the illegal trade practices, active participation by it in the affairs of the subsidiary need not be proved to hold the parent vicariously responsible. Under these circumstances, complicity will be presumed. *See Goodman v. Federal Trade Commission*, 244 F.2d 584, 590 (9th Cir. 1957).

> "The Commission was thus warranted in considering the harmonization of local policies [by the subsidiaries] with those [of the parent] as a fact, the absence of conflicts making affirmative action by [the parent] unnecessary. But it does not follow that [the parent's] domination of its system was any less real or effective. Historical ties and associations, combined with strategic holdings of stock, can on occasion serve as a potent substitute for more obvious modes of control." *North American Company* v. *Securities Exchange Commission*, 327 U.S. 686, 693 (1946).

We find that Crowell Collier so dominated and controlled the acts of its Collier subsidiaries, that the corporate identities of the latter may be ignored, and the parent held vicariously responsible for their acts.

B. Whether Collier & Son, even though dissolved, and Collier, Inc. may properly be subjected to the Commission's order to cease and desist.

As was previously indicated, on December 13, 1960, approximately eleven months after the filing of the complaint in this case, the Board of Directors of Crowell Collier met. At that meeting, resolutions were adopted to dissolve Collier & Son, which dissolution became effective on December 30, 1960, and to create Collier, Inc., which was formed on De-

cember 22, 1960. As was also indicated, the Commission's 1966 order, which was made effective in 1969, applied not only to Collier & Son "under this or any other name," but also to "its successor or assign."

The petitioners argue that no order may issue against Collier & Son because it was dissolved in 1960,[7] that Collier, Inc. may not be included in any order because it was not named in the complaint; that Collier, Inc. cannot be reached vicariously through the dissolved Collier & Son.[8] We disagree.

Ordinarily, since orders of the Federal Trade Commission operate prospectively, they may not be applied against dissolved corporations, for to do so would be a "useless act." *Federal Trade Commission* v. *Ruberoid Company*, 343 U.S. 470 (1951); *Galter* v. *Federal Trade Commission*, 186 F.2d 810 (7th Cir. 1951), *cert. denied*, 342 U.S. 818; *United Corporation* v. *Federal Trade Commission*, 110 F.2d 473 (4th Cir. 1940); *Chamber of Commerce* v. *Federal Trade Commission*, 13 F.2d 673 (8th Cir. 1926). It is not "useless," however, to subject a dissolved corporation to an injunction in order to reach a successor corporation through which unlawful practices may be continued. *See Goodman* v. *Federal Trade Commission*, 244 F.2d 584 (9th Cir. 1957). The Federal Trade Commission would have no power at all if companies could circumvent its orders by dissolving and succeeding themselves prior to their issuance. Thus, where it is clearly shown that a dissolved corporation engaged in unfair and deceptive trade practices, and that its business has been continued by another, subsequently-formed corporation, the latter may be subject to the cease and desist order as

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[7] The petitioners' argument that the evidence of the substantive violations by Collier & Son is so stale as to vitiate the proceedings will be considered in the next section of this opinion.

[8] The petitioners' objections to the legality of the remand proceedings, whereat the sole evidence of substantive violations by Collier, Inc. was taken, shall be considered in the next section.

well as the former. *Cf. Walling* v. *Reuter*, 321 U.S. 671, 674-75 (1944) (Injunction to prevent future violations of the Fair Labor Standards Act).

> "Not only is such an injunction enforceable by contempt proceedings against the corporation, its agents and officers and those associated with it in the conduct of its business, but it may, also, in appropriate circumstances, be enforced against those to whom the business may have been transferred, whether as a means of evading the judgment or for other reasons. The vitality of the judgment in such a case survives the dissolution of the corporate defendant. And these principles may be applied in fuller measure in furtherance of the public interest . . . than if only private interests were involved. [Citations omitted.]" *Id.*

This result does not depend upon the existence of a state statute authorizing the extension of corporate life for certain purposes,[9] *Id.*, and may obtain even in the presence of evidence that the substantive violation has been discontinued, provided it is capable of being resumed. *Perma-Maid Company* v. *Federal Trade Commission*, 121 F.2d 282 (6th Cir. 1941); *Hershey Chocolate Corp.* v. *Federal Trade Commission*, 121 F.2d 968 (3d Cir. 1941); *Goodman* v. *Federal Trade Commission*, 244 F.2d 585 (9th Cir. 1957) *and cases cited therein at* 593, n. 22. *See also, United States* v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290, 307-10 (1897). *But see, Galter* v. *Federal Trade Commission*, 186 F.2d 810 (7th Cir. 1951).

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[9] Collier & Son and Collier, Inc. were both incorporated in Delaware. Title 8 of the Delaware Code Ann. § 278 (1953) extends the existence of dissolved corporations "until any judgments, orders or decrees therein shall be fully executed." This statute has been applied to extend the lives of dissolved corporations for the purpose of applying prospectively-operating administrative orders, *National Labor Relations Board* v. *Weirton Steel Co.*, 135 F.2d 494 (3d Cir. 1943); *United States* v. *Line Material Co.*, 202 F.2d 929, 932 (6th Cir. 1953); Marcus, *Suability of Dissolved Corporations*, 58 Harv. L. Rev. 675 (1945).

As a corollary to the foregoing legal principles, where it is shown that a successor corporation is the alter ego of the original respondent, it, as well as the dissolved corporation, may be subjected to the order. The question of successorship is one of fact, which turns on such considerations as: Whether both companies engaged in the same business; whether the successor has the capability to perpetuate, continue, or resume deceptive practices employed by the dissolved corporation; whether they have in common individuals who have served in similar corporate capacities; whether there is substantial identity of ownership between the dissolved and the operative corporation; and, in general, the circumstances surrounding the dissolution of the one and the establishment of the other. Stated differently, if the later corporation is "merely a disguised continuance" of the earlier, it may be subjected to a cease and desist order properly issued against the earlier. *Southport Petroleum Company* v. *National Labor Relations Board*, 315 U.S. 100, 106 (1942); *Pallet & Box Company* v. *National Labor Relations Board*, 324 F.2d 833 (6th Cir. 1963); *Makela Welding, Inc.* v. *National Labor Relations Board*, 387 F.2d 40 (6th Cir. 1967).

Our inquiry must be directed at these issues: Whether Collier & Son violated section 5; whether Collier, Inc. was a "successor" of Collier & Son capable and reasonably likely to perpetuate the illegal trade practices of Collier & Son.

Collier & Son. We find substantial evidence in the record as a whole to support the Commission's findings that Collier & Son committed, for at least a substantial period of its corporate existence, the following illegal trade practices in violation of Section 5 of the Federal Trade Commission Act: Its agents, in the door-to-door sales of books, falsely represented that they were conducting a survey; that the encyclopedia was offered free or at a reduced price provided that yearly supplements were purchased; that the agent was connected with Collier & Son's or Crowell Collier's advertising or publicity department and was not selling anything; that

the encyclopedia was offered free or at a reduced rate if the potential customers would comment on the set in a letter, and authorize their names to be used in advertising the encyclopedia; that theirs was a special offer for a limited time only and being made only to a select group of people and not to the public at large; that the general sales promotion would be conducted at a later date; that the annual supplement volume regularly sold for $10.00 but was being offered to the prospects for only $3.95, that certain additional books included in the combination offer were being given free with the purchase of encyclopedias and supplements; and that the encyclopedia was nationally advertised for $389 or more. The nationwide scope of these operations imparted the requisite interstate character.

Collier, Inc. As was indicated above, the decisions to dissolve Collier & Son and to establish Collier, Inc. were made by the Board of Directors the same day, shortly after the filing of the complaint in this case. The stated purpose for this substitution of corporate entities was to facilitate certain accounting changes, which could be more easily accomplished by substituting a new corporation than by filing the requisite forms with the Internal Revenue Service.[10] As has been indicated above, this corporate change was but one of many similar formal subsidiary reorganizations effected by the parent to accomplish purposes unrelated and unessential to the maintenance of corporate vitality.

It has also been illustrated that the nature of the business and the objects or purposes to be transacted by Collier & Son and Collier, Inc., as specified by their articles of incorporation, were identical. The new subsidiary, like the old, was wholly-owned by Crowell Collier, and each occupied the same offices in the parent's building. During the last year of operation of Collier & Son and the first year of Collier, Inc., their officers,

[10] The same reason was given for the dissolution of P. F. Collier & Son Corp [#1] in 1952.

directors, and sales managers were nearly all the same people, performing the same functions. The organizational structures of the two corporations were identical.

Moreover, from unrebutted testimony, the second trial examiner found that as late as 1967, Collier, Inc. was employing the same unfair and deceptive trade practices as was Collier & Son between 1955 and 1960.[11]

Collier, Inc. argues that for it to be bound to the order, the Commission should have amended its complaint to include it, and should have held a new trial on the issue of its culpability. We find this argument to be without merit. *Cf. NLRB* v. *Ozark Hardwood Company,* 282 F.2d 1, 4 (1960).

We find substantial evidence in the record as a whole to support the Commission's finding that Collier, Inc. was "merely a disguised continuance" of the dissolved Collier & Son, and is, therefore, subject to the order to cease and desist.

III.

Whether the remand proceedings were illegal.

The petitioners argue that the Commission erred in 1966 in ordering remand proceedings on the grounds that, first, complaint counsel had had adequate opportunity at the original hearings to adduce evidence on the issues of domination and successorship; and, second, that by 1966, the proceedings had become unduly protracted. We reject both arguments.

Stripped of surplussage, the petitioners' first argument is that, in its 1966 decision, the Commission prejudged the issues of domination and successorship; found liability, decided that the evidence was insufficient to support its findings, and remanded the matter to obtain sufficient evidence to support

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[11] This fact alone may be sufficient to hold Collier, Inc. a "successor" subject automatically to the order. *Cf. NLRB* v. *Downtown Bakery Corp.*, 330 F.2d 921, 925 (6th Cir. 1964); *NLRB* v. *Herman Brothers Pet Supply, Inc.*, 325 F.2d 68, 70-72 (6th Cir. 1963); *NLRB* v. *Colton,* 105 F.2d 179, 182-83 (6th Cir. 1939).

its conclusion. The petitioners claim that they were, in essence, "tried" twice for the same offense in derrogation of their right to due process of law. We find support for this argument neither in the facts of this case, nor in the law.

In his brief before the first Commission hearing, complaint counsel included reference to several pleadings and other public papers to prove that Collier, Inc. was the successor to Collier & Son, and that Crowell Collier dominated and controlled the acts of both subsidiaries. These papers were not before the first hearing examiner and the Commission was uncertain whether they were accurate, or properly before it. The Commission stated:

> "If the information cited from the above sources is accurate and was properly before the commission in the form of probative evidence, we believe it would be relevant to the issue of the liability of P. F. Collier, Inc., and of the parent, Crowell-Collier Publishing Company. However, some doubt arises as to whether this information is properly before us. Moreover, P. F. Collier, Inc., not having been in existence at the time of the issuance of the complaint, and not having been organized until after the hearings were midway, has not offered any testimony on the issue of its status as a successor.
>
> "In order to resolve any doubt whether the information referred to previously is properly before the Commission in the form of probative evidence and to afford P. F. Collier, Inc. an opportunity to be heard on the single issue of whether it is *in fact* the successor to P. F. Collier & Son Corporation, we are remanding this case for the limited purposes (1) of ascertaining the truth of this information and obtaining it in probative form; (2) to allow complaint counsel to offer evidence in support of his claim that P. F. Collier, Inc., is the successor corporation to respondent P. F. Collier & Son Corporation; and (3) to afford respondent Crowell-Collier Publishing Company and P. F. Collier, Inc., the opportunity to submit any evidence in rebuttal to that which may be submitted by complaint

counsel." CCH Trade Reg. Rep., Par. 17,718 *at* 23,063 (1966-67 *Transfer Binder*).

It also appeared to the Commission that the first trial examiner had improperly refused to admit certain evidence on these issues offered by complaint counsel.

We are hard put to find evidence of prejudgment by the Commission on this record. On the contrary, by remanding the case for further findings and not deciding it on the basis of mere suspicion, the Commission acted with deliberate regard not only for the protection of the petitioners' rights, but also for the interest of the public. *Federal Trade Commission* v. *J. Weingarten, Inc.*, 336 F.2d 687, 695 (5th Cir. 1964), *cert. denied*, 380 U.S. 905 (1965).

> "Under such circumstances, what is a Commission charged by statute with the serious responsibility of effectuating statutory policy to do? Must it; on the one hand, in the face of a record indicating substantial basis for a likely finding of statutory transgressions, simply acquiesce in a default, largely for technical, not substantive, deficiencies? Or must it, out of some supposed attitude of administrative advocacy, press on, leaving the respondent to its appeal to the Courts of Appeals whose dockets are already overcrowded without adding as grist to the judicial mill deficiencies which the administrative body is perfectly willing procedurally to correct." *Id.*

See P. Lorillard Co. v. *Federal Trade Commission*, 186 F.2d 52, 58 (4th Cir. 1950); *Shein* v. *United States*, 102 F.Supp. 320, 323 (D. N.J. 1951), *aff'd*, 345 U.S. 944 (1952). Due process was not offended, and the petitioners' rights were not prejudiced, by the Commission's remand of the proceedings in 1966.

In a broader context, the petitioners' second argument is that these proceedings have dragged on for such a long period of time, the complaint having been originally filed in 1960, that the evidence is cold and stale, and the public interest would

not be served by the enforcement of the Commission's order. In this regard, we share the petitioners' and the Supreme Court's indignation for the "nigh interminable" delays of administrative agencies in safeguarding the public welfare. *Federal Power Commission* v. *Hunt*, 376 U.S. 515, 527 (1964); *Atlantic Refining Company* v. *Public Service Commission of New York*, 360 U.S. 378, 389 (1959). The indications in this case are that both parties, the petitioners and the Commission, share responsibility for the protracted nature of the proceedings. Nevertheless, by tolerating such delays, the Federal Trade Commission, which was created to expedite the prosecutions of those employing deceptive acts or practices in commerce, becomes their accomplice. Dissenting from the opinion of the Commission remanding the case to a second trial examiner, Commissioner MacIntyre stated:

> "Too often one of the members of the Commission and others have complained that the Federal Trade Commission is a fit article for a museum. Some of this criticism is directed against prolonged proceedings and ineffectiveness. To take part in this action of the majority is to help this criticism. I will not be so obliging. I dissent."

If this Court were confident that an injunction against this order would spur the Commission into more expeditious action in all subsequent cases, one should issue. In so doing, however, we would release two wrongdoers, and the public, not the Commission, would be the loser.

For the purposes of this litigation, Crowell Collier, Collier & Son, and Collier, Inc. have been proven to form a single enterprise, with the parent dominating and controlling the acts of both subsidiaries, which are merely alter egos of one another. The violations shown to have been employed by Collier & Son, therefore, may be deemed those of the enterprise.[12] The fact that this evidence may be old, per se,

[12] In so holding, we do not rely upon the unrebutted testimony before the second examiner that Collier, Inc. engaged in similar

does not mean that an order issued upon it is vitiated. Where an illegal trade practice is once proved against an enterprise, and is capable of being perpetuated or resumed, it may be presumed to have been continued, and an order may issue to prevent it, even upon a showing that it has been discontinued or abandoned. *See, e.g., Perma-Maid* v. *Federal Trade Commission*, 121 F.2d 282 (6th Cir. 1941).[13]

We find sufficient public interest in this controversy to warrant the issuance of an order. *Federal Trade Commission* v. *Klesner*, 280 U.S. 19, 30 (1929); *Federal Trade Commission* v. *Royal Milling Company*, 288 U.S. 212, 216 (1933).

IV.

The lawfulness and propriety of the Commission's order.

The petitioners object to that portion of the Commission's order which requires them to cease and desist from:

> "Failing to disclose at the time admission is sought into the home, office or other establishment of the prospective purchaser or purchaser that the person making the call is respondent's salesman and is soliciting the sale of respondent's merchandise [and]
>
> * * *
>
> Using any plan, scheme or ruse as a door-opener to gain admission into a prospect's home, office or other establishment, which misrepresents the true status and mission of the person making the call." [14]

---

illegal trade practices as late as 1967. This evidence was admitted for the sole purpose of proving continuity of Collier & Son's business by Collier, Inc., and was used by the Commission solely to prove successorship.

[13] To the extent of any apparent inconsistency, we decline to follow *Bearings, Inc.*, CCH Trade Reg. Rep., Par. 16,763. (1963-65 *Transfer Binder*).

[14] The Commission's order is reproduced in full at n. 6, *supra*, pp. 5-7.

The petitioners do not argue that misrepresentation of the sort forbidden by the order is not violative of the Act, nor do they argue that they are not employing this deceptive device. They do argue that by forcing them affirmatively to disclose the nature of their business when they approach a prospective customer, the order puts them at a competitive disadvantage with other door-to-door book peddlers who have not been forbidden from doing the same thing. *See American Marketing Associates, Inc.*, Dkt. 8727, CCH Trade Reg. Rep., Par. 18,182 (Feb. 5, 1968); *The Child's World, Inc.*, CCH Trade Reg. Rep., Par. 20,892 (Nov. 14, 1968); *Joseph J. Bidnick, an individual, trading and doing business as Standard Education Library*, CCH Trade Reg. Rep., Par. 22,980 (1965-67 *Transfer Binder*); *Basic Books, Inc.*, 56 FTC 69 (1959); *Encyclopedia Britannica, Inc.*, 48 FTC 1416 (1952); *Americana Corporation*, 46 FTC 253 (1949); *National Surveys, etc.*, 47 FTC 888 (1949).

It is well established that "the Commission has wide discretion in its choice of a remedy deemed adequate to cope with unlawful practices," *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 611 (1946), and that "it must be allowed effectively to close all roads to the prohibited goal, so that the order may not be by-passed with impunity." *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952). So long as there is a "reasonable relation" between the remedy and the unlawful practice, the courts will not interfere. *Id.* The fact that the orders issued against Crowell Collier's competitors were insufficient does not mean that the order in this case must also be. Such a situation would afford the basis for an argument that Colliers' competitors should have been dealt with likewise, not that the petitioners should escape. *Heavenly Creations, Inc.* v. *Federal Trade Commission*, 339 F.2d 7 (2d Cir. 1964); *Exposition Press, Inc.* v. *Federal Trade Commission*, 295 F.2d 869 (2d Cir. 1961); *International Art Company* v. *Federal Trade Commission*, 109 F.2d 393 (7th Cir. 1940); *National Candy Company* v. *Federal Trade Commission*, 104 F.2d 939 (7th Cir. 1939). The purpose of Com-

mission orders is not to put those employing deceptive acts or practices *in pari delicto* with each other.

V.

The order of the Federal Trade Commission is enforced in its entirety.

LIBRARY
SUPREME COURT, U.S.

In the Supreme Court of the United States

OCTOBER TERM, 1970

P. F. COLLIER & SON CORPORATION, ET AL.,
PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2-3
Statement	3
Argument	7
Conclusion	11

CITATIONS

Cases:

Atlantic Refining Co. v. *Public Service Comm.*, 360 U.S. 378	9
Consolidated Royal Chemical Corp. v. *Federal Trade Commission*, 191 F.2d 896	
Deering Milliken, Inc. v. *Johnston*, 295 F.2d 856	9
Federal Power Commission v. *Hunt*, 376 U.S. 515	9
Federal Trade Commission v. *National Lead Company*, 352 U.S. 419	11
Federal Trade Commission v. *Ruberoid Company*, 343 U.S. 470	10
Federal Trade Commission v. *Standard Education Society*, 302 U.S. 112	8
Federal Trade Commission v. *Universal Rundle Corp.*, 387 U.S. 244	10
Moog Industries v. *Federal Trade Commission*, 355 U.S. 411	10
Jacob Siegel Company v. *Federal Trade Commission*, 327 U.S. 608	10

Statutes, regulation and rule: Page

Administrative Procedure Act, 5 U.S.C. 555(b) (Supp. V), Section 6(b) 3, 7
Federal Trade Commission Act, 38 Stat. 719, as amended by 52 Stat. 111 and 66 Stat. 632 (15 U.S.C. 45 (a)(1)), Section 5(a)(1) 2, 3-4, 7
35 C.F.R. 15,164, September 29, 1970 11
Supreme Court Rules, Rule 23(1)(i) 2

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A24) is reported at 427 F.2d 261. The orders and opinion of the Federal Trade Commission issued September 30, 1966 (J.A. 64-87), the initial decision and order of the hearing examiner on remand (J.A. 99-148), and the final order and opinion of the Commission (J.A. 196-231) are not officially reported.[1]

[1] Petitioners have not included in their appendix the opinions of the Federal Trade Commission in this case, as required

JURISDICTION

The judgment of the court of appeals was entered on May 27, 1970, and a petition for rehearing was denied on July 14, 1970. The petition for writ of certiorari was filed on September 2, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the order of the Federal Trade Commission entered after five years of hearings, remanding the case to adduce additional evidence relevant to the corporate relationship of petitioners, violated the "reasonable time" requirement of Section 6(b) of the Administrative Procedure Act (5 U.S.C. 555(b)).

2. Whether the Commission properly included a provision in a cease and desist order, requiring petitioners' salesmen affirmatively to disclose the nature of their business at the time they approach a prospective customer.

STATUTES INVOLVED

Section 5(a)(1) of the Federal Trade Commission Act, 38 Stat. 719, as amended by 52 Stat. 111 and 66 Stat. 632 (15 U.S.C. 45(a)(1)), provides:

> Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

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by Rule 23(1)(i). We are lodging with the Clerk two copies of the joint appendix before the court of appeals (J.A.), which contains these opinions.

Section 6(b) of the Administrative Procedure Act (5 U.S.C. (Supp. V) 555(b)), provides in pertinent part:

> "With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it.

STATEMENT

Petitioners, Crowell-Collier and Macmillan, Inc. ("Crowell-Collier"), and two of its subsidiaries, P. F. Collier and Son Corporation ("Collier and Son") and P. F. Collier, Inc. ("Collier, Inc."), have been engaged in the publication and sale of various reference books, including Collier's Encyclopedia, which was introduced to the market in 1950. Petitioners' books are sold at retail to the general public through agents or salesmen who approach prospective purchasers in their homes or at their places of business. The salesmen are furnished with sales kits, various books, pamphlets, circulars, and other promotional literature, and are generally instructed in the procedures to be followed in making solicitations (J.A. 47).

The Federal Trade Commission, on January 18, 1960, issued a complaint (J.A. 4-10) against petitioners Crowell-Collier[*] and its wholly-owned subsidiary, Collier and Son, charging that the latter had engaged in unfair methods of competition and unfair and deceptive acts and practices in the door-to-door sales of Collier's Encyclopedia, in violation of Section

---

[*] Prior to 1965, petitioner Crowell-Collier's name was The Crowell-Collier Publishing Company, which name appears in the complaint (J.A. 4).

5 of the Federal Trade Commission Act. The complaint charged Crowell-Collier with violating Section 5 through its control and domination of the acts and policies of Collier and Son.

The complaint alleged, *inter alia*, that petitioners, through their salesmen, falsely represented that the salesmen were conducting a market research survey; that they were connected with petitioners' advertising or publicity department and were not selling anything; that a set of Collier's Encyclopedia would be given free or at a reduced price in exchange for an agreement to purchase yearly supplements, a letter with comments on the product, and the right to use the person's name; that the annual supplement regularly sold for $10 but was being specially offered for $3.95; that this was a "special introductory offer," limited to the time of the call on the prospect; and that other benefits or advantages were available (J.A. 6-8).

Hearings before a trial examiner commenced in August 1960. In December 1960, Collier and Son was merged into its parent and Collier, Inc. was formed by Crowell-Collier to assume the business of selling encyclopedias. Collier and Son did not seek dismissal of the complaint as to it, nor did complaint counsel seek to amend the complaint to include Collier, Inc.

Hearings were held in several cities; over 100 witnesses were called and more than 200 exhibits introduced in evidence. In September 1965, the hearing examiner rendered an initial decision (J.A. 14-45) ordering the complaint dismissed. He ruled that

Crowell-Collier was not subject to a Federal Trade Commission order because it was not engaged in interstate commerce and did not control, dictate, or dominate the acts and policies of its subsidiary, Collier and Son (J.A. 44). Because Commission orders operate prospectively only, he held that none could issue against Collier and Son, since that corporation had dissolved (*ibid.*). Finally, stressing the protracted nature of the proceedings and the "staleness" of the evidence, the examiner concluded that there was "no present, specific, or substantial public interest" in continuing the proceedings (J.A. 40-44). Because of these determinations, the examiner made no findings of fact concerning the deceptive practices charged in the complaint.

On appeal by complaint counsel, the Commission vacated the initial order. It found that Collier and Son had violated the Act by "lengthy and blatant use of deception" in the sale of books, including Collier's Encyclopedia (J.A. 67-84). The Commission issued a cease and desist order enjoining petitioner Collier and Son and its "successor or assign" from committing further violations (J.A. 64-66), but stayed the effective date of the order pending a remand to a hearing examiner for further findings on two issues: (1) whether the parent, Crowell-Collier, controlled Collier and Son such that the order should be applied to it; and (2) whether Collier, Inc. was the successor cor-

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[3] The hearing examiner excluded evidence offered by Commission counsel concerning the conduct of petitioners after 1960, as well as evidence relevant to the issue whether Collier, Inc. was successor to Collier and Son (J.A. 33-35).

poration to Collier and Son, and, as such, subject to the order.

Following remand hearings, a second hearing examiner concluded that Crowell-Collier so dominated and controlled the acts and practices of Collier and Son that it should be held liable for the subsidiary's conduct, and that Collier, Inc. was in fact the successor to Collier and Son and should also be subject to the order (J.A. 99-148). The Commission adopted the findings and conclusions of the examiner, and made effective its original cease and desist order against all petitioners (J.A. 196-231).

The order directs the companies to cease and desist, *inter alia*, from:

> 3. Failing to disclose at the time admission is sought into the home, office or other establishment of the prospective purchaser or purchasers that the person making the call is respondent's salesman and is soliciting the sale of respondent's merchandise [the affirmative disclosure requirement].
>
> 4. Using any plan, scheme or ruse as a door-opener to gain admission into a prospect's home, office or other establishment, which misrepresents the true status and mission of the person making the call [the negative disclosure requirement]. [Pet. App. A4-A5, n. 6].

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[4] Two Commissioners dissented. Commissioner MacIntyre would have provided for an immediate hearing before the Commission rather than remanding to an examiner for additional evidence (J.A. 85-86). Commissioner Elman dissented without opinion (J.A. 84).

[5] The examiner who had presided at the original hearings had died in the interim.

The court of appeals unanimously affirmed the Commission's order. It held that there was substantial evidence in the record to support the findings that petitioners had violated Section 5 (Pet. App. A5-A22). The court also concluded that the remand on the issues of the corporate relationships among petitioners was appropriate; that the length of the proceedings had not destroyed the public interest in issuance of a cease and desist order (Pet. App. A22); and that the affirmative disclosure provision of that order was lawful and proper (Pet. App. A23-A24).

ARGUMENT

Petitioners challenge only two aspects of the decision of the court of appeals before this Court. They contend first that the remand to the hearing examiner, after proceedings already had taken five years, violated the requirement of Section 6(b) of the Administrative Procedure Act that agencies conclude matters presented to them within a reasonable time. 5 U.S.C. (Supp. V) 555(b). Second, they argue that the imposition of the requirement that petitioners' salesmen affirmatively disclose the nature of their business when they approach a prospective customer is arbitrary and discriminatory.

1. Petitioners do not challenge the findings, amply supported by the evidence, that they have engaged in deceptive practices in violation of Section 5 of the Federal Trade Commission Act. Their central argument against imposition of a cease and desist order is that the Commission spent too much time reaching the decision that they had violated the Act.

Petitioners' primary focus is upon the five years during which the initial hearing was held.[6] They make no showing of prejudice as a result of the protracted proceedings nor do they demonstrate that the public interest in elimination of their deceptive practices was any less at later times.

In *Federal Trade Commission* v. *Standard Education Society*, 302 U.S. 112, this Court condemned practices similar to those in which petitioners engaged as "contrary to decent business standards. To fail to prohibit such evil practices would be to elevate deception in business and to give to it the standard and dignity of truth." 302 U.S. at 116. Aside from general references to the "staleness" of the record (Pet. 3-7), petitioners do not suggest that their unlawful practices have been abandoned, or that changed circumstances have eliminated the need for relief. As the court below properly observed:

> The fact that this evidence may be old, *per se*, does not mean that an order issued upon it is vitiated. Where an illegal trade practice is once proved against an enterprise, and is capable of being perpetuated or resumed, it may be presumed to have been continued, and an order may issue to prevent it, even upon a showing that it has been discontinued or abandoned * * *. [Pet. App. A21-A22.]

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[6] The hearing examiner, in the initial decision, discussed the various causes of the lengthy proceedings (J.A. 17-18). Petitioners do not challenge the conclusion of the court of appeals that "both parties * * * share responsibility for the protracted nature of the proceedings" (Pet. App. A21).

The position of petitioners appears, in essence, to be that the five-year proceeding was unreasonable as a matter of law. There is no authority, however, for the imposition of *per se* rules regarding the length of administrative proceedings in opinions of this Court criticizing their "nigh interminable" delays (*Federal Power Commission* v. *Hunt*, 376 U.S. 515, 527; *Atlantic Refining Co.* v. *Public Service Comm.*, 360 U.S. 378, 389). Contrary to petitioners' assertions, the leading decisions in courts of appeal do not reflect differing approaches to the general problem of delay (Pet. 8), but a consistent one in which such factors as the public interest, the reasons for delay and the interest of the parties are weighed in each case. See, *e.g.*, *Deering Milliken, Inc.* v. *Johnston*, 295 F. 2d 856, 867 (C.A. 4).

The court of appeals in this case considered the various factors and correctly concluded that the public interest in enforcement outweighed any possible effect on the speed of other Commission proceedings which reversal in this case solely on grounds of its protracted nature would have.

2. Assuming an order may properly issue against them, petitioners challenge only that part which requires their salesmen affirmatively to disclose their purpose at the doorstep. They claim that this requirement discriminates against them because it has not been imposed on other companies engaged in door-to-door sales of encyclopedias.[7]

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[7] A negative disclosure requirement, see p. 6, *supra*, to which petitioners do not object has been imposed in the five cases they cite in which orders have been proposed or issued

"The Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices." *Jacob Siegel Company* v. *Federal Trade Commission*, 327 U.S. 608, 611. It "must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity." *Federal Trade Commission* v. *Ruberoid Company*, 343 U.S. 470, 473. Only where there is "patent abuse of discretion" will a court interject itself into the enforcement process. *Moog Industries* v. *Federal Trade Commission*, 355 U.S. 411, 414; *Federal Trade Commission* v. *Universal Rundle Corp.*, 387 U.S. 244.

The Commission's findings in this case amply justify the affirmative disclosure remedy. It "found that a principal component of the unlawful sales methods * * * involved misrepresenting the purpose of the salesman's call and deceptively failing to disclose that the caller was simply attempting to sell * * * encyclopedias" (J.A. 230). That other companies may not be subjected to the same disclosure requirements only affords, as the court of appeals pointed out, "the basis for an argument that Collier's competitors should have been dealt with likewise, not that the petitioners

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since the order in this case was initially issued in September, 1966 (Pet. 13).

Since the negative requirement precludes any but a truthful explanation of his purpose from a salesman seeking entry, the additional "affirmative" requirement will adversely affect Collier salesmen only in cases where people would admit an individual who gives no explanation but not one who discloses that he is a salesman.

should escape" (Pet. App. A23). "[T]hose caught violating the Act must expect some fencing in." *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 431.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1970.

The Commission's recently proposed Trade Regulation Rule concerning door-to-door sales of all products whose price is greater than $10 requires affirmative disclosure by a salesman upon initial contact before any other statement is made or question asked. 35 C.F.R. 15,164, issued September 29, 1970.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF OF PETITIONERS

The brief in opposition to the petition herein informs the Court, *without comment*,[1] of an important and relevant development occurring since the petition was filed. The brief states that the Federal Trade Commission in the September 29, 1970 issue of the Federal Register[2] gave notice of proposed legislative rule-making

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[1] p. 11, note 8.

[2] 35 C.F.R. 15164.

requiring an affirmative disclosure by door-to-door salesmen of all products.[3] The notice in the Federal Register invites the filing of data, views or arguments by January 12, 1971 and gives notice of the commencement of a public hearing one week later.

The affirmative requirements provision contemplated by the proposed Rule is virtually identical with the one in the Order which petitioners have asked this Court to review. The petition herein urged that the affirmative disclosure requirement imposed on petitioners, and no one else, was unfair, arbitrary, discriminatory, a patent abuse of agency discretion, and constituted a failure to fashion remedies in an even-handed manner. The validity of that position is now more clearly evident from the announced rule-making proceeding.

The language in the Order and in the proposed Rule is virtually the same:

Affirmative Disclosure Requirement in the Order (Paragraph 3)	Affirmative Disclosure Requirement in the Proposed Rule (Paragraph 5(g))
". . . to disclose at the time admission is sought into the home, office or other establishment of the prospective purchaser or purchasers that the person making the call is respondent's salesman and is soliciting the sale of respondent's merchandise."	". . . to clearly, affirmatively and expressly reveal, at the time seller initially contacts the buyer or prospective buyer, and before making any other statement or asking the buyer any question, that the purpose of the contact is to effect a sale, stating the goods or services which the seller has to offer."

[3] 35 C.F.R. 15165 "All persons, firms, corporations, or others engaged in door-to-door sales, in commerce, as 'commerce' is defined in the Federal Trade Commission Act, will be subject to the requirements of any Trade Regulation rule promulgated in the course of this proceeding."

Petitioners submit that this Court should grant the writ of certiorari if for no other reason than to strike paragraph 3 of the Order, and thus place petitioners on an equal footing with their encyclopedia competitors, pending the outcome of the rule-making proceeding.

Respectfully submitted,

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